



BUSINESS LAW SECTION

NONPROFIT & UNINCORPORATED ORGANIZATIONS COMMITTEE

THE STATE BAR OF CALIFORNIA

180 Howard Street

San Francisco, CA 94105-1639

<http://www.calbar.org/buslaw/nonprofits/>

TO: The State Bar Office of Governmental Affairs

RE: A.B. 624 (Coto)

Committee Position:

☒ Oppose

Date position recommended: January 8, 2008

Nonprofit & Unincorporated Organizations Committee vote: April 27, 2007: unanimous approval of Members attending (a quorum being present) January 8, 2008: 5-0 (drafting committee approval of revisions, per delegated authority)

Executive Committee vote: January 7, 2008: 16-0 (delegation of authority to Legislative Subcommittee) January 8, 2008: 7-0 (vote of Legislative Subcommittee)

Contact: Lisa A. Runquist
Chair, Nonprofit & Unincorporated Organizations Committee
Runquist & Associates
17554 Community Street
Northridge, CA 91325
(818) 760-8986
lisa@runquist.com

I. STATEMENT OF POSITION

The Nonprofit & Unincorporated Organizations Committee (the "Committee") of the Business Law Section of the State Bar of California welcomes this opportunity to provide comments on Assembly Bill No. 624 ("AB 624" or the "bill"). This is the first statement of position that the Committee has submitted on AB 624. After careful consideration, the Committee opposes AB 624.

This bill would not advance governance of foundations. It is intrusive at many levels, both internal and external to foundations. It would burden foundations out of proportion to any benefit that might result. Finally, the bill may adversely affect the charitable grant-making of foundations, as well as the ability of worthy nonprofits to receive such grants. Consideration should be given to examining the impact of this proposal on foundations and other more effective alternatives.

A. Description of AB 624.

This bill would add Corporations Code Section 5081 and Probate Code Section 16065. Those new provisions would require a private foundation with assets over \$250,000,000 to collect specified ethnic and gender data pertaining to its governance and grant-making. This information includes: the racial and gender composition of its board of directors, the racial and gender composition of its staff, the percentage of contracts awarded to minority owned businesses, the number of grants and percentage of grant dollars awarded to organizations serving various

ethnic communities, the number of grants and percentage of grant dollars awarded to organizations where 50% or more of the board are ethnic minorities, and the percentage of grant dollars awarded to organizations where 50% or more of the staff are ethnic minorities. A private foundation would have to post this information on its website and include this information in its annual report.

B. The Committee's Position.

The Committee opposes AB 624 for four reasons. First, although the bill seeks to ensure more transparency and accountability from foundations, implementation of its provisions will not foreseeably improve corporate governance of foundations and may actually make governance more difficult.

Second, the bill requires racial, ethnic and gender data pertaining both to governance and to grant-making. This requirement is intrusive to the personal affairs of the board members and staff of foundations. The intrusiveness extends beyond the foundations to their grant recipients and to businesses that interact with foundations. Such intrusiveness is in conflict with constitutional rights of privacy.

Third, this bill would be burdensome both to the foundations and to the grant-recipient nonprofits. It would impose multiple layers of administration and costs due to its requirements to secure, maintain, and report extensive data.

Finally, this bill may affect the ability of nonprofits to obtain grants from foundations. If implemented, foundations may seek to maintain ethnic and diversity ratios that would then deter them from making grants that would adversely affect such ratios, even if such grants would be in furtherance of their charitable mandate. Even if the nonprofit would meet the diversity requirements, proving this may well be beyond the ability of the nonprofit seeking the grant.

C. Analysis.

1. *Impact on Corporate Governance.*

AB 624 is addressed to governance of foundations with assets over \$250 million. They would be required to report on their website and in their annual report the racial, ethnic and gender composition of their boards of directors, including the percentage of board members that are African-American, Asian-American, Pacific Islander, Caucasian, Latino, Native American and Alaskan Native. It also requires disclosure of the racial, ethnic and gender composition of foundation staff.

The accumulation and disclosure of racial, ethnic and gender data would not improve foundation governance. Only the qualifications and character of the management can do that. Disclosure of the required details about boards of foundations would not necessarily cause a change in their composition. It may even make it more difficult for foundations to attract members to serve on their boards or to attract staff members.

2. *Intrusiveness.*

The procedures required under this bill would be intrusive. The intrusiveness extends not only to the nonprofit foundations, but the bill would also require foundations to obtain racial, ethnic and gender data from virtually every person or entity with whom the foundation interacts in fulfilling its purpose. At the foundation level, every board and staff member would be required to disclose personal racial, ethnic and gender data. The foundations also would have to inquire of each of its business contracts whether such business is owned by African-Americans, Asian-Americans, Pacific Islanders, Caucasians, Latinos, Native Americans and Alaskan Natives. The foundations also would need to inquire of potential grant-recipients whether they are organizations serving African-Americans, Asian-Americans, Pacific Islanders, Caucasians, Latinos, Native Americans and Alaskan Natives. Additionally, foundations would need to inquire whether the potential grant-recipient organizations have boards

where 50% or more of such board members are ethnic minorities. Finally, foundations would need to inquire of potential grant-recipient organizations whether their boards and their staff are 50% or more ethnic minorities. The intrusiveness of this legislation is substantial and does not stop at the foundation level.

Many people prefer not to provide such information about themselves and properly consider it a matter of privacy. Article 1 Section 1 of the California Constitution specifically assures the right of privacy. The U.S. Constitution is less precise on the existence of a right of privacy, but it has played a key role in numerous court rulings in which the right of privacy has effectively been recognized. Enactment of the bill would present serious concerns that it would result in court action and that the provisions of the bill would ultimately be held to violate at least the California Constitution. Foundations may be permitted to request such information, and potentially make commercial or operating decisions based upon it. But the State may not require a foundation to do so.

3. *Burden.*

The inquiries required by this bill place enormous burdens and draining expenses on each foundation in the multiple layers of required recordkeeping (inquiries, responses, follow ups and the like) and administration. Foundations would need to secure and keep diversity data on their board members, staff, each business vendor, potential grant recipients and actual grant recipients. Foundations would need to maintain data on each grant recipient's board and staff composition. Foundations would be burdened by having to devote more of their funds and staff time to monitoring internal and external administration for diversity reporting, and thus diverting attention and money that could be better spent on their charitable missions.

4. *Chilling Effect on Grants Fulfilling the Foundation's Purpose.*

Charitable recipients of foundations may be adversely affected by this bill. One inadvertent consequence of this bill may be that foundations that are seeking to maintain specific ethnic and other ratios demonstrating diversity, may be deterred from making grants that would adversely affect such ratios even if such grants would be in furtherance of their charitable mandate. The administrative burden that would be imposed on the charitable recipients / potential recipients would be at least as much as that imposed on the foundation itself. This is likely to deter worthy nonprofit organizations from even attempting to obtain such a foundation grant. And if the organizations do gather and monitor the required data, this again will divert a significant amount of attention and money on this level as well, that would otherwise be better used to carry out their charitable purposes.

II. GERMANENESS

The Committee believes that its members have the special knowledge, training, experience and technical expertise to provide helpful comments on the Bill and that the positions advocated herein are in the best interests of California nonprofit organizations and the constituents interests that they serve.

III. CAVEAT

This statement is only that of the Nonprofit & Unincorporated Organizations Committee of the Business Law Section of the State Bar of California. The positions expressed herein have not been adopted by the Business Law Section or its overall membership or by the State Bar's Board of Governors or its overall membership, and are not to be construed as representing the position of the State Bar of California. There are currently more than 8,800 members of the Business Law Section.

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Drafting Committee:

Louis E. Michelson
15233 Ventura Boulevard, PH-1
Sherman Oaks, CA 91403
(818) 784-1700
lemtax@earthlink.net

Lani Meanley Collins
Collins & Associates
213 West Canon Perdido Street
Santa Barbara, California 93101-3706
(805) 730-1333
lani.collins@collins-assoc.com

R. Bradbury Clark
O'Melveny & Myers LLP
400 South Hope Street, Rm. 1729
Los Angeles, CA 90071-2899
213-430-6123
bclark@omm.com

Lisa A. Runquist
Runquist & Associates
17554 Community Street
Northridge, CA 91325
(818) 760-8986
lisa@runquist.com

Cherie L. Evans
Evans & Rosen
425 Pacific Avenue
San Francisco, CA 94133
(415) 264-1800
cherie@evansrosen.com

cc: Carol K. Lucas
Steven K. Hazen